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DARRELL F. SMITH, THE ATTORNEY GENERAL  
STATE CAPITOL  
PHOENIX, ARIZONA

October 30, 1967

DEPARTMENT OF LAW OPINION NO. 67-26 (R-111)

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REQUESTED BY: E. ARNOLD ISAACSON, M.D., M.P.H.  
Deputy Commissioner of Arizona  
State Department of Health

QUESTION: What authority does the Arizona  
State Department of Health have  
to control the pesticide content  
of milk?

ANSWER: (See body of opinion)

A review of the state statute on pesticides reveals that there are two state agencies which have been created to deal, either wholly or in part, with pesticides and operations relative thereto. These public offices are as follows:

- (1) The State Chemist (A.R.S. §3-341 to §3-357)
- (2) The Board of Pest Control Applicators (A.R.S. §3-371 to §3-386)

Indirectly, concerning the question of milk, pesticide considerations involve two other state agencies:

- (1) The State Health Department (A.R.S. §36-101 to §36-1661); and
- (2) The State Dairy Commissioner (A.R.S. §3-601 to §3-634)

For the purposes of your particular question the involvement of the State Chemist and the Board of Pest Control Applicators may be disposed of by stating that the State Chemist is basically involved with the registration and labeling of pesticides and the

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Board of Pest Control Applicators deals primarily with the licensing of applicators and the regulation of those licensees.

The answer to your question therefore, revolves about the duties of your department, and that of the State Dairy Commissioner. As to the State Dairy Commissioner, A.R.S. §3-603 sets forth the duties of the Commissioner, that is:

"A. The commissioner shall enforce the provisions of this article and prescribe rules and regulations deemed necessary or advisable to carry out the provisions thereof except provisions relating to health and sanitation which shall be enforced by the state department of public health."

Also, A.R.S. §3-605, as amended 1963, provides as follows:

"A. The production, transportation, handling and sale of milk and milk products, and the inspection of dairy herds, dairies and milk plants shall be regulated in accordance with the terms of the unabridged form of the 1953 edition of the United States public health service milk ordinance and code, a certified copy of which shall be on file in the office of the secretary of state, except that all milk, reconstituted or recombined milk and flavored milk prepared for sale or use by the ultimate consumer shall contain not less than three and five tenths per cent butterfat.

B. The words "health officer" when used in the milk ordinance and code means the state dairy commissioner or his authorized representative.

C. Powers and duties in the milk ordinance and code relating to health and sanitation, are vested in the state department of public health."

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The State Board of Health by state law is required to do the following (A.R.S. §36-105 (B) (4):

"Provide reasonable regulations necessary to assure that all food or drink sold or distributed for human consumption is free from unwholesome, poisonous or other foreign substance and filth, insects or disease-causing organisms. The regulations shall prescribe reasonably necessary measurements governing the production, processing, labeling, storing, handling, serving and transportation of food and drink including but not limited to milk and frozen desserts. The regulations shall prescribe minimum standards for the sanitary facilities and conditions which shall be maintained in any plant, packing house, abattoir, dairy, warehouse, restaurant or other premises, and in any truck or other vehicle in which food or drink is produced, processed, stored, handled, served or transported. The regulations shall provide for the inspection and licensing of premises and vehicles so used, and for abatement as public nuisances of any premises or vehicles which do not comply with the regulations and minimum standards."

In answering your first question, it is necessary to interpret the relationship between the duties of the State Board of Health in regard to "health and sanitation: on the one hand, and the duties of the Dairy Commissioner as "health officer" under the milk ordinance and code. At the inception, taking into account the duty and responsibility of the Board of Health as set forth in A.R.S. §36-105(B) (4), the statute is clear in its vestment of health and sanitary responsibilities in the State Board of Health. In determining the duties and responsibilities of the State Board of Health and, also of the State Dairy Commissioner, we have examined both the substance and the history of the statutes involved. This examination has revealed at once a situation which plainly requires clarification in the interest of those who produce, handle, etc., milk and of the two administrative bodies now involved. The power of this office to furnish

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relief is limited in this instance to the field of fair interpretation of the meaning and intent of the statutes involved.

No extensive discussion of the 1953 milk ordinance and code is necessary. Under A.R.S. §36-105 (D) (4), your department was specifically given the power to "provide reasonable regulations necessary to assure that all food or drink sold or distributed for human consumption is free from unwholesome, poisonous or other foreign substances, etc., . . . ." The 1953 milk ordinance and code as referred to in §3-605 is ostensibly not intended to limit or supercede the regulatory power of the Board of Health insofar as the control of health and sanitation in regard to milk. This intent is evidenced by the specific mandate in §3-605 to the effect that all powers and duties in the milk ordinance and code relating to health and sanitation shall be vested in the State Department of Health. This intention would appear to be in harmony with the Arizona Supreme Court decision of State v. DeWitt, 49 Ariz. 197, 65 P.2d 659 (1937) wherein the court held that the State Dairy Code is essentially a health measure. (Reaffirmed in Loftus v. Russell, 69 Ariz. 245, 212 P.2d 91 (1949)). In such a case, since your department is given specific power to regulate the production, processing, labeling, storing, handling, serving and transportation of milk, we specifically hold your department does have the power to control pesticides in milk. Our decision is based upon the fact that pesticides in milk, when found in certain quantities, does become a matter of public health. In an analogous case (Gardenhire v. State, 26 Ariz. 14, 221 P. 228 (1923) the court stated (page 22 of 26 Ariz.):

"It is a matter of common knowledge that milk is a necessary food of the sick and of the infirm, of the old and the young; that through the agency of impure milk the germs of many diseases are disseminated, and even where there is an absence of any deleterious impurity or the terms of specific diseases adulterated or diluted milk is not wholesome and nutritious . . . . It cannot be said that the effect of formaldehyde in milk is so well known not to be deleterious that the courts must take judicial cognizance of that fact. That its action is such that it

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changes the chemical properties of the milk so that it will not sour was established and conceded on the trial, and it was for this reason that it was insisted that, as it preserved the milk for souring, it was claimed to be highly beneficial. We cannot accept this conclusion. It must be recognized that it was a legislative function, in the passage of this ordinance for the preservation of health, to insist that milk should have neither adulterants nor preservatives placed in it, and to inquire as to the effect thereof."

Adulteration, as defined in Chapter 8 of Title 36 (Pure Food Control) occurs in any food, including milk, if:

1. A substance has been mixed or packed therewith, reducing or injuriously affecting its quality, purity, strength or food value.  
\* \* \*
5. It contains added poisonous or other added deleterious ingredients.

(A.R.S. §36-902)

That pesticides are adulterants when present in milk is clear. Section 2 of the U.S. Public Health Service Milk Code specifically states that: "The presence of antibiotics, chemical bactericides, or other unapproved additives shall be deemed a violation of this section." Therefore, should the State Board of Health discover a deleterious level of pesticide in milk, it could, pursuant to Chapter 8 (A.R.S. §36-911) seize and destroy the milk pursuant to court order. Section 2 of the U.S. Public Health Service Milk Code would also authorize the State Department of Health to impound adulterated milk.

In answering your query, we feel compelled to correlate our answer with the resultant duties of the State Dairy Commissioner. The Dairy Commissioner under his specifically enumerated statutory powers, is required to (1) insure that certain milk products are correctly graded, (2) license dealers, (3) insure compliance with dairy barn constructional requirements, (4) insure

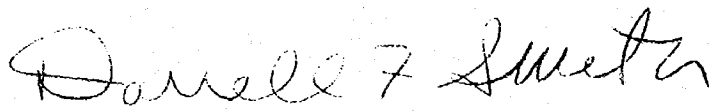
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tuberculin tests are made, (5) regulate milk holding tax, (6) determine fat content in milk, etc. We confidently are of the opinion, after careful scrutiny of the whole milk ordinance and code, the duties of the State Dairy Commissioner and the duties of the State Board of Health and the State Health Department, that the Legislature intended to place in the State Board of Health exclusive jurisdiction to regulate the health and sanitation aspects of the production, processing, labeling, etc. of milk. A reading of A.R.S. §36-605 unequivocally lead us to this conclusion.

We further conclude that the Legislature did not intend to subject those who were so regulated to dual supervision. We do not deem it necessary to itemize each section of the milk ordinance and code to delineate which function should be performed by the State Department of Health or the Dairy Commissioner. This department will, if requested, in the future, and if the need should arise, do so. Suffice it to say that in most instances the U. S. Health Service Code and Ordinance sections do present a clear cleavage between health and sanitation measures and non-health and non-sanitation measures. Health and sanitation measures are clearly the duty of the State Department of Health to enforce.

It is envisioned by this department, and is the intention of the Legislature, that the health organizations of the state and the State Dairy Commissioner can, and will, cooperate in coordinating the supervision which is set forth and required by Arizona law insofar as controlling milk and milk products.

Respectfully submitted,

  
DARRELL F. SMITH  
The Attorney General

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